No. 17-988

IN THE

Supreme Court of the United States

LAMPS PLUS, INC., ET AL.,

Petitioners,

v.

FRANK VARELA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

THOMAS R. MCCARTHY
Counsel of Record
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
tom@consovoymccarthy.com

Attorneys for Amicus Curiae

282092

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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Circuit City Stores, Inc. v. Adams,
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Dean Witter Reynolds v. Byrd,
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Int'l Brotherhood of Elec. Workers, Local No. 265 v. O.K. Elec. Co.,
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Kindred Nursing Centers Ltd. P'ship v. Clark,
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Marmet Health Care Center, Inc. v. Brown,
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Cited Authorities

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Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) 5

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 3, 4

Nationwide Mut. Ins. Co. v. Home Ins. Co., 330 F.3d 843 (6th Cir. 2003) 16

Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013) 1, 17, 18

Southland Corp. v. Keating, 465 U.S. 1 (1984) 4

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) ..... *passim*

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Zaborowski v. MHN Gov't Servs., Inc., 936 F. Supp. 2d 1145 (N.D. Cal. 2013), aff'd, 601 F. App'x 461 (9th Cir. 2014) 11

Cited Authorities

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AAA, *Employment Arbitration Rules & Mediation Procedures* (2016) 8, 10

AAA, *Employment Due Process Protocol* (2016) 10

Alicia Bannon, Brennan Ctr. for Justice, *Federal Judicial Vacancies: The Trial Courts* (2013) 7, 8

Am. Bar Ass'n, *The Growing Crisis of Underfunding State Courts* (Mar. 16, 2011) 7

American Arbitration Association, *2016 Annual Report* 6

Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 Ohio St. J. on Disp. Resol. 627 (2008) 9

Cal. Dispute Resolution Inst., *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure* (Aug. 2004) 6

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Nat'l Ctr. for State Courts, *Examining the Work of State Courts* (2016) 6

David Lewin, *Dispute Resolution in Non-Union Organizations: Key Empirical Findings*, in Samuel Estreicher, ed., N.Y.U.'s 53rd Annual Conference on Labor (Aspen Publishers 2003).....12

David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557 (2005) 5, 12

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Cited Authorities

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G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 Ky. L.J. 786 (2011-2012) 7

H.R. Rep. No. 68-96 (1924).....3, 4

H.R. Rep. No. 97-542 (1982).....4

JAMS, *Policy on Employment Arbitration Minimum Standards of Procedural* Fairness.....11

Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998) 6

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Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58-JAN Disp. Resol. J. 56 (2003-04).....10

Nat'l Workrights Inst., Employment Arbitration: What Does the Data Show? (2004).....9, 10

Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 Cardozo J. Conflict Resol. 267 (2008).....12

Cited Authorities

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Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 Cornell J.L. & Pub. Pol'y 477 (2009) 9, 12

S. Rep. No. 68-536 (1924) 4

Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251 (2006).....9

Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89 (2001).....9

Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783 (2008) 9

Cited Authorities

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U.S. Courts, *U.S. District Courts—Judicial Business* 2015 6

U.S. Courts, *United States District Courts—National Judicial Caseload Profile* (2018) 6

William Glaberson, *Despite Cutbacks, Night Court's Small Dramas Go On*, N.Y. Times, June 2, 2011 7

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. *See, e.g.*, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Many of the Chamber's members regularly employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA") and this Court's consistent endorsement of arbitration, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

Amicus thus has a strong interest in the faithful and consistent application of this Court's FAA jurisprudence and, in particular, the FAA's "two goals"—"enforcement of private agreements and encouragement of efficient and speedy dispute resolution." *Dean Witter Reynolds*, 470 U.S. 213, 221 (1985).

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus agrees with Petitioners that "[t]he Ninth Circuit's interpretation of the parties' arbitration agreement to authorize class arbitration cannot be squared with the FAA and this Court's precedents interpreting it." Pet. Br. 10. *Amicus* writes separately to highlight the many benefits of arbitration "as envisioned by the FAA" and to explain how the decision below flouts the liberal policy favoring arbitration, deprives employers and employees of the benefits of arbitration, and creates serious due process problems that put employers in an untenable position as defendants.

ARGUMENT

I. The Liberal Federal Policy Favoring Arbitration Reflects the Fact that Arbitration Is a Fair, Efficient, and Inexpensive Alternative to Litigation that Benefits Businesses and Employees Alike.

The FAA "establishes 'a liberal federal policy favoring arbitration.'" *Concepcion*, 563 U.S. at 339 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). This pro-arbitration policy reflects the fact that arbitration is a faster and cheaper alternative to litigation that is fair and beneficial to businesses and employees. Indeed, both Congress and this Court have recognized the many benefits of arbitration. And the available data confirm that arbitration is cheaper and faster than litigation and produces fair outcomes.

Congress enacted the FAA nearly a century ago "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer*, 500 U.S. at 24. Congress's intended goal was "to place an arbitration agreement 'upon the same footing as other contracts, where it belongs.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1 (1924)).

Congress wanted to ensure that contractual arbitration rights are "on equal footing" with all other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), because it recognized the many advantages of arbitration. The House Report accompanying the FAA stated that "the costliness and delays of litigation ... can

be eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." H.R. No. 68-96, at 2. The Senate Report likewise stated that the FAA was needed "to avoid the delay and expense of litigation." S. Rep. No. 68-536, at 3 (1924). Even then, Congress recognized that the expenses and delays associated with litigation tend to increase over time. *See id.* Arbitration thus benefits all disputants—"corporate interests, as well as ... individuals." *Id.*

More than a half-century after the FAA was enacted, Congress had not changed its mind about the "many" benefits of arbitration. H.R. Rep. No. 97-542, at 13 (1982). Indeed, it expounded upon them, emphasizing that arbitration "is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices." *Id.* Congress also explained that "arbitration could relieve some of the burdens on the overworked Federal courts." *Id.*

This Court likewise has acknowledged the "real benefits" of arbitration. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001). For more than three decades, the Court consistently has enforced the liberal federal policy favoring arbitration, recognizing that the FAA "creates federal substantive law requiring parties to honor arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984); *accord Moses H. Cone*, 460 U.S. at 24. And in doing so, the Court repeatedly has highlighted the "advantages" of arbitration. *Allied-Bruce*

Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995); *see, e.g., Concepcion*, 563 U.S. at 345 (arbitration "reduc[es] the cost and increas[es] the speed of dispute resolution"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) (arbitration provides "lower costs" and "greater efficiency and speed"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985) (emphasizing the relative "simplicity, informality, and expedition of arbitration").

Moreover, the Court has emphasized that these benefits and advantages are every bit as real in the employment context. *See Circuit City*, 532 U.S. at 123 ("[F]or parties to employment contracts ..., it is true ... that there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."). Indeed, the Court has noted that the relative informality, inexpensiveness, and less adversarial nature of arbitration "may be of particular importance in employment litigation." *Id.* Like Congress, then, the Court has explained that these advantages inure to the benefit of all disputants—including both employers and employees.

Data support what Congress and this Court have recognized. Arbitration is faster than traditional litigation. *See* David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1572 (2005) ("[F]ew dispute the assertion that arbitration is faster than litigation.").

In March 2018, the median civil lawsuit in federal court took 26.3 months to reach trial. *See* U.S. Courts, *United States District Courts—National Judicial Caseload Profile (2018)*, at 1, https://bit.ly/2NzIssv. State courts, which handle more cases than federal courts, have even worse workloads. *Compare* Nat'l Ctr. for State Courts, *Examining the Work of State Courts* 4 (2016), https://bit.ly/2zDiode (reporting over 15 million new civil cases filed in state court in 2015), *with* U.S. Courts, *U.S. District Courts—Judicial Business 2015*, https://bit.ly/2ul3t29 (reporting 279,036 new civil cases filed in federal court in 2015).

Arbitration, by contrast, is estimated to take "less than half of the time required for civil litigation." Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55 (1998). For example, a study by the California Dispute Resolution Institute found that consumer and employment disputes were resolved in an average of 104 days in arbitration. Cal. Dispute Resolution Inst., *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure* 19 (Aug. 2004), https://bit.ly/2zAmiDL.

A recent AAA study concluded that "U.S. District Court cases took more than 12 months longer to get to trial than cases using arbitration," and that, in states with the highest caseloads (in terms of both AAA arbitration and federal district proceedings), "cases using litigation took 16 months longer on average to get to trial than cases that were being arbitrated." American Arbitration Association, *2016 Annual Report* at 8, https://bit.ly/2ulZvpW.

The increased speed of arbitration is due primarily to its decreased procedural complexity. But it is also attributable to the fact that the courts are clogged. Forty states had to cut funding to their courts in 2010, according to a report by the American Bar Association's Task Force on the Preservation of the Justice System, which was co-chaired by David Boies and Theodore B. Olson. *See* Am. Bar Ass'n, *The Growing Crisis of Underfunding State Courts* (Mar. 16, 2011), https://bit.ly/2ulZH8E; *see also* G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 Ky. L.J. 786, 787 (2011-2012). The effects of these funding cuts have been devastating: in California, "[a]t least 53 courthouses have closed," and "[c]ourts in 20 counties are closed for at least one day a month." Maura Dolan, *Budget Cuts Force California Courts to Delay Trials, Ax Services*, L.A. Times, Apr. 9, 2013, https://lat.ms/2mg9YyV. These and other court closures "have forced some San Bernardino residents to drive up to 175 miles one way to attend to a legal matter." *Id.* In New York City, the wait for a court date is four times longer than it was before the budget cuts. *See* William Glaberson, *Despite Cutbacks, Night Court's Small Dramas Go On*, N.Y. Times, June 2, 2011, https://nyti.ms/2zKO54v.

Although the vast majority of civil claims are filed in state court, the federal courts also have extraordinarily high caseloads, especially at the trial level, where the backlogs are particularly severe. The Brennan Center for Justice has found that "the number of pending cases per sitting judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992-2007." Alicia Bannon, Brennan Ctr. for Justice, *Federal Judicial Vacancies: The Trial Courts* 5 (2013), https://bit.ly/2L5A4m7. While "[a] judge in 1992 had an average of

388 pending cases on his or her docket," "[b]y 2012, the average caseload had jumped to 464 cases—a 20 percent increase." *Id.*

Arbitral forums do not have comparable backlogs and can resolve disputes rapidly. Moreover, the hundreds of thousands of arbitrations conducted each year reduce the caseloads of state and federal courts, improving their efficiency as well. *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping our Legal System*, 108 Penn St. L. Rev. 165, 166-67 & n.11 (2003).

Arbitration is also far cheaper than litigation. In general, the AAA charges employees a $200 filing fee and requires businesses to shoulder the rest of the costs. *See* AAA, *Employment Arbitration Rules & Mediation Procedures* 33-34 (2016), https://bit.ly/2KVvJ5C. For many employees, arbitration costs nothing—their filing fees and attorney's fees are shifted to the employer. *See* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 802 (2003).

Litigation, by contrast, is much more expensive. The cost of merely initiating civil suit in a federal district court has risen to $400 or more in recent years. *See* Judicial Conference of the U.S., District Courts Miscellaneous Fee Schedule (approving a $50 "administrative" filing fee on top of the previous $350 filing fee), https://bit.ly/2L4081b. In litigation, unrepresented parties have little hope of navigating the complex procedures that apply in court. They must hire a lawyer, whose hourly billing rate far exceeds the cost of proceeding in arbitration

and, in many cases, the entire value of their claim. If the plaintiff retains the lawyer on a contingency basis, the lawyer's compensation substantially reduces the amount of any award. Accordingly, the cost savings of arbitration allow individuals to bring small-value claims that would be priced out of court and larger claims that would be substantially reduced by contingency fees. *See* Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 791-92 (2008); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58-JUL Disp. Resol. J. 9, 10-11 (2003); Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), https://bit.ly/2JiBhSk.

The streamlined procedures of arbitration make it cheaper for businesses too. *See* Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 Ohio St. J. on Disp. Resol. 627, 659 (2008). Businesses often pass these savings on to consumers and employees in the form of lower prices and higher wages. *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254-56 (2006); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 92 (2001).

Arbitration not only is faster and cheaper than litigation, but it also allows employees to vindicate their claims with at least as much success as litigation. *See* Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 Cornell J.L. & Pub. Pol'y 477, 513 (2009). For example, in 2004, the National

Workrights Institute compiled all available employment-arbitration studies and concluded that employees were 19% more likely to win in arbitration than in litigated cases. Nat'l Workrights Inst., *supra*. Median awards received by plaintiffs were the same as in court, although the distorting effect of occasional large jury awards resulted in higher average recoveries in litigation. *Id.* In addition, a study of employment-discrimination suits found that 46% of those who arbitrated won, compared to 34% of those who litigated; that only 4% of litigated cases ever reached trial; and that arbitrations were resolved 36% faster. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58-JAN Disp. Resol. J. 56, 56-58 (2003-04).

Arbitration is fair too. Arbitrators and courts ensure that arbitration provisions will be enforced only if they meet basic guarantees of fairness and due process. And companies increasingly have opted to make arbitration provisions even more favorable to employees.

The nation's two leading arbitration service providers, the AAA and JAMS, each have standards to ensure that arbitrations are conducted fairly. The AAA's Employment Due Process Protocol requires independent and impartial arbitrators, reasonable costs, and remedies comparable to those available in court. *See* AAA, *Employment Due Process Protocol*, https://bit.ly/2NQaMXA. The AAA will not administer an employment arbitration unless the arbitration is consistent with the Due Process Protocol. *See* AAA, *Employment Arbitration Rules and Mediation Procedures* 9-10 (2016), https://bit.ly/2KVvJ5C. Likewise, JAMS will not administer a predispute arbitration clause between an employer and a employee unless the

clause complies with "minimum standards of procedural fairness." *See* JAMS, *Policy on Employment Arbitration Minimum Standards of Procedural Fairness*, https://bit.ly/2uf871J. Both AAA and JAMS recognize that independence, due process, and low costs for the consumer are vital elements of a fair and accessible arbitration system.

The courts provide another layer of oversight. State and federal courts are empowered by Congress to invalidate arbitration clauses that run afoul of generally applicable principles of state contract law, such as unconscionability. 15 U.S.C. § 2; *see Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (stating that courts may invalidate arbitration provisions under standards "that are not specific to arbitration"). Courts have not hesitated to strike down arbitration provisions that subject employees to unfair procedures. For example, courts routinely invalidate arbitration provisions that purport to limit a employee's right to recover certain types of damages, *see, e.g.*, *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 267 (3d Cir. 2003) (provision barring punitive damages); provisions that impose excessive fees, *see, e.g.*, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926 (9th Cir. 2013) (provision requiring employee to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the employee's claim"); and provisions that unreasonably shorten statutes of limitation, *see, e.g.*, *Zaborowski v. MHN Gov't Servs., Inc.*, 936 F. Supp. 2d 1145 (N.D. Cal. 2013) (provision shortening the statute of limitations to 6 months), *aff'd*, 601 F. App'x 461 (9th Cir. 2014).

At the same time, the vast majority of arbitration agreements do not contain these defects. As companies

have gained more experience with arbitration, they have sought to make arbitration even more favorable for employees, not less. *See, e.g.*, Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 Cornell J.L. & Pub. Pol'y 477, 513 (2009).

Reducing the cost and complexity of dispute resolution has an added benefit in the employment context. It makes the process less adversarial and thus more likely to preserve employment relationships. *See, e.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 936 (4th Cir. 1999); David Sherwyn et. al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1560 (2005); David Lewin, *Dispute Resolution in Non-Union Organizations: Key Empirical Findings*, in Samuel Estreicher, ed., N.Y.U.'s 53rd Annual Conference on Labor (Aspen Publishers 2003).

Simply put, arbitration provides many benefits to employees. Without arbitration, they would be "far worse off, for they would find it far harder to obtain a lawyer, find the cost of dispute resolution far more expensive, wait far longer to obtain relief and may well never see a day in court." Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 Cardozo J. Conflict Resol. 267, 267 (2008).

II. The Decision Below Flouts the Federal Policy in Favor of Arbitration, Negates the Advantages of Arbitration for Employers and Employees, and Creates Serious Due Process Problems that Force Defendants into an Untenable Position.

One of the fundamental precepts of the FAA is that "arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); *see also Volt*, 489 U.S. at 478-79 (underscoring the congressional goal of "ensuring that private arbitration agreements are enforced according to their terms"). Consistent with that baseline precept, this Court held in *Stolt-Nielsen* that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for doing so." 559 U.S. at 684. Courts and arbitrators thus may not infer "[a]n implicit agreement to authorize class-action arbitration ... solely from the fact of the parties' agreement to arbitrate." *Id.* at 685.

But that is precisely what the lower courts did in this case. Both the district court and the Ninth Circuit panel majority held that class arbitration was required, notwithstanding the fact that there was no contractual basis for doing so. To be sure, the lower courts purported to rely on language within the arbitration agreement. But that contract language did nothing more than replace litigation with arbitration as the parties' agreed-upon mechanism for dispute resolution by waiving the right to go to court and resolve disputes via trial. That is, the relevant contract language did precisely what any garden-variety arbitration agreement does: it waived "the right to go to court and receive a jury trial." *Kindred Nursing*

Ctrs. v. Clark, 137 S. Ct. 1421, 1427 (2017). By twisting this language to provide for class arbitration, the lower courts would "effectively permit[] any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018). The lower courts thus flatly contradicted this Court's holding in *Stolt-Nielsen*.

Judge Fernandez (dissenting from the panel majority's decision) thus was right on point in describing the Ninth Circuit panel decision as a "palpable evasion of *Stolt-Nielsen*." Pet. App. 5a. But the decision is even worse than that. By forcing class procedures on the parties, the panel robbed the parties of the many benefits and advantages of arbitration as envisioned by the FAA, thereby running afoul of the "liberal federal policy favoring arbitration." *Concepcion*, 563 U.S. at 339.

As outlined above, the entire point of arbitration is to provide parties with a relatively informal dispute resolution process—one that is speedy, fair, inexpensive, and less adversarial than litigation. But this case has been the opposite. Had this case proceeded promptly to bilateral arbitration it likely would have been resolved within a few months. *See supra* 6 (noting that the California Dispute Resolution Institute found that consumer and employment disputes were resolved in an average of 104 days in arbitration). Instead, this case has already been in court for nearly two-and-a-half years, consuming the time and resources of not only the parties but also the already overburdened federal court system. This costly, drawn-out, highly adversarial process is the exact opposite of what the parties bargained for.

It is no answer to say that the lower courts authorized arbitration (class arbitration, that is) and that Petitioners thus could have avoided litigation by proceeding with class arbitration. Class arbitration is "not arbitration as envisioned by the FAA," *Concepcion*, 563 U.S. at 351, and "lacks its benefits," *id.* at 348. "[S]witch[ing] from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality." 563 U.S. at 348. Indeed, "class arbitration *requires* procedural formality." *Id.* at 349. It thus makes dispute resolution "slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. By shifting to class arbitration, then, the informality, speed, and cost savings of traditional bilateral arbitration are lost. That is precisely why this Court has repeatedly held that requiring classwide arbitration where it is not consensual interferes with the fundamental attributes of arbitration and undermines its prime objectives. *Concepcion*, 563 U.S. at 348.

At the same time, shifting to class arbitration "greatly increases risks to defendants," *id.* at 350—because of the sharply limited judicial review inherent in arbitration. As the Court has noted, "[t]he absence of multilayered review makes it more likely that errors will go uncorrected." *Id.* Parties are willing to accept these errors when "their impact is limited to the size of individual disputes" and "outweighed by savings from avoiding the courts." *Id.* But when faced with the prospect of damages aggregated among thousands of claimants, the risk of error becomes to great to bear. *Id.* ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

Class arbitration thus negates the chief advantages of arbitration and magnifies its disadvantages. It is "not arbitration as envisioned by the FAA." *Id.* at 351. Rather,

it "is a worst-of-both worlds hybrid of arbitration and litigation." Pet. 25. Accordingly, the imposition of class procedures (where it is nonconsensual) flouts the FAA and its federal policy in favor of arbitration.

Perhaps worse still, forcing employers into class arbitration creates serious due process problems. Unlike an Article III court, an arbitrator derives his or her power solely from contract. *See, e.g.*, *Stolt-Nielsen*, 559 U.S. at 682 ("[A]n arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution."); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648-49 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.").

For that reason, "[a]n arbitrat[or] may not determine the rights or obligations of non-parties." *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 846 (6th Cir. 2003); *see also Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1256 (7th Cir. 1994); *Int'l Brotherhood of Elec. Workers, Local No. 265 v. O.K. Elec. Co.*, 793 F.2d 214, 216 (8th Cir.1986). Accordingly, when absent class members have not been involved in selecting the particular arbitrator who is hearing the dispute or have not affirmatively consented to that arbitrator's authority, those absent class members would have strong grounds to collaterally attack any resulting award as inconsistent with their due process rights. And the strength of those arguments is greatly magnified when, as here, there is no contractual basis for submitting the dispute to class rather than bilateral arbitration.

These due process rights of absent non-parties—including their potential ability to collaterally attack an arbitration award—highlight why an arbitrator cannot bootstrap the named parties' submission to her authority, including her authority to decide the question of class-wide arbitrability, to bind absent nonparties. The res judicata effect of a class arbitration on "class members" other than opt-in claimants is doubtful at best. Under the FAA, "arbitration is a matter of consent, not coercion." *Stolt-Nielsen*, 559 U.S. at 681 (internal quotation omitted). Accordingly, when an arbitration agreement does not clearly authorize class arbitration, the arbitrator's lack of authority over non-parties gives absent non-party class members a strong due-process argument that they could not be bound by any award resulting from an arbitration proceeding in which they did not participate. *See Oxford Health*, 569 U.S. at 574 (Alito, J., concurring) ("With no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute."). This would be true even where the absent class members "signed contracts with arbitration clauses materially identical to those signed by the plaintiff[s] who brought this suit," because "an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination." *Id.*[2]

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2. Notably, the notice and opt-out procedures employed in class-action litigation in court cannot cure this problem. *See Oxford Health*, 569 U.S. at 574 (Alito, J., concurring). "[A]t least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members" who "have not submitted themselves to th[e] arbitrator's authority *in any way*."

Where class arbitration is ordered without the requisite contractual basis, then, it is "vulnerable to collateral attack." *Id.* at 575. Absent class members in such a situation could "unfairly 'claim the benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.'" *Id.* (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 546-47 (1974)). This heads-I-win, tails-you-lose result is fundamentally "unfair[]" to defendants. *Id.*

CONCLUSION

Amicus curiae respectfully requests that the Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

THOMAS R. MCCARTHY
Counsel of Record
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
tom@consovoymccarthy.com

Attorneys for Amicus Curiae

Id. at 574-75 (second emphasis added). That is because absent non-parties' "silence" as to the arbitrator's authority—*i.e.*, a mere failure to affirmatively opt out—is not the same as the contractual consent required for an arbitrator to have authority over those non-parties. *Id.*